

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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| In the Matter of Notice of Proposed Rulemaking | : | CAN-SPAM Act Rulemaking |
| and Request for Comments Relating to the | : | Project No. R41108 |
| Definitions, Implementation and Reporting | : | |
| Requirements Under the CAN-SPAM Act | : | |
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COMMENTS OF THE MAGAZINE PUBLISHERS OF AMERICA

Introduction

On behalf of the membership of the Magazine Publishers of America (“MPA”), we are pleased to submit these comments in response to the Federal Trade Commission’s most recent notice of proposed rulemaking and request for public comment relating to the definitions, implementation and reporting requirements under the CAN-SPAM Act (“NPRM”). 70 F.R. 25426 (May 12, 2005).

MPA is the national trade association for consumer magazine publishers. Its membership includes approximately 240 domestic magazine publishing companies that publish more than 1,400 individual magazine titles, more than 80 international magazine publishers, and more than 100 associate members who are suppliers to the magazine publishing industry. Our member magazines range from well-known, nationally distributed publications to smaller-circulation and local publications.

As noted in our previous comments relating to this rulemaking, MPA applauds and fully supports the Commission’s efforts to eliminate unwanted, and in particular, fraudulent and deceptive, commercial e-mail messages. We likewise commend the Commission for its efforts in this most recent NPRM to address some of the concerns of publishers and others identified in

previous comments submitted as part of this rulemaking process, in particular those comments relating to the compliance challenges associated with e-mails containing messages from multiple advertisers.

Nevertheless, as described in greater detail below, we continue to have concerns with certain of the Commission's most recent proposals, in particular, the proposed test for determining the sender of multiple advertiser messages, the proposal to reduce the time period for honoring opt-out requests from ten (10) to three (3) days, and the prohibition on requiring recipients to provide any information beyond their e-mail address in order to effectuate an opt-out request. Contrary to the position taken by the Commission in its most recent NPRM, we also believe that "Forward to a Friend" e-mail campaigns should be deemed to fall outside the scope of the CAN-SPAM Act, irrespective of whether the recipient of a commercial e-mail message is provided with an incentive or inducement to forward such message. Finally, MPA believes that the Commission should clarify that e-mails sent by employers to employees at employer-owned e-mail addresses are not subject to the requirements of CAN-SPAM.

In addition to filing these comments, MPA has endorsed a letter signed by a coalition of trade associations that share a common interest in the issues being considered by the Commission in this NPRM.

Comments

I. The Commission Should Clarify Which Entity Controls the Content of the Message in the Case of Multiple Advertiser E-mail Messages

The MPA appreciates and applauds the Commission's attempt to address the legitimate concerns of marketers with respect to the implementation of the CAN-SPAM Act requirements for commercial e-mail messages containing advertisements from more than one seller.

As noted by the Commission, in instances where there are multiple advertisers in a single commercial e-mail message, those advertisers should have the ability to designate a single advertiser as the “sender” for CAN-SPAM purposes so as to avoid undue compliance burdens and endangering the privacy of consumers’ personal information. NPRM, 70 F.R. at 25430. In this regard, we believe that the Commission’s efforts at crafting, in essence, a safe harbor whereby advertisers can structure multiple advertiser messages in such a way that there is only a single “sender” of such messages for CAN-SPAM purposes are to be commended.

Nevertheless, MPA does have some concerns with the Commission’s proposed three prong test for determining the “sender” of a multiple advertiser message. In particular, MPA believes that further clarification and guidance is required with respect to determining the identity of “the person [who] controls the content” of multiple advertiser e-mail messages.

For example, each advertiser in a multiple advertiser message will typically control that portion of the message content which relates to the advertisement of its own products or services. That being the case, we believe that the Commission should, at a minimum, clarify that “control” of the content of the message refers to control of content other than that relating to the advertisement of the seller’s own products or services.

The Commission should also clarify that merely having the right to “approve” the content of other advertisers in a multiple advertiser message does not constitute “control of the content” for purposes of the proposed criteria set forth in the NPRM. There may be a variety of reasons why marketers participating in a multiple advertiser message may choose to reserve the right to “approve” the content of the other material that will be contained in that same message. And, in fact, joint e-mail marketing campaigns or programs may provide that the each advertiser shall have the right to review and approve the other’s content. The insistence on and exercise of such

approval rights should not deprive such advertisers of the right to avail themselves of the safe harbor proposed by the Commission in the NPRM. For this reason, MPA believes that the Commission should clarify that “control” does not include mere review and approval rights over content.

Accordingly, MPA would recommend that the Commission modify the “control of content” criteria to refer to “control of content of the email other than content relating to the seller’s own products or services.” Additionally, the Commission should clarify that the mere review and approval of “content” does not constitute control of that content. In determining what constitutes “control” the Commission should consider the same factors it currently utilizes in determining liability for advertising messages, e.g.: (i) active participation in the creation and development of the content, and (ii) ultimate control over whether the content would be disseminated.

Finally, with respect to an exclusively commercial e-mail message sent pursuant to a subscription, we believe that the Commission should clarify that the sender of such email is the entity which provides the recipient the subscription. In other words, to the extent that such commercial subscription message contains third party seller advertisements, and thus constitutes a multiple advertiser message, only the seller with which the recipient has a subscription will be deemed the sender.

II. Ten (10) Day Period for Effectuating Opt-out Requests Should Not Be Shortened

MPA urges that the current ten (10) day period for honoring opt-out requests not be shortened. While the Commission has apparently received comments indicating that certain entities possess the ability to process opt out requests more quickly, and further that there is commercially available mailing list software which allows for “almost immediate” opt out request processing (NPRM, 70 F.R. at 25443), there is no evidence to suggest that the ability to

honor opt out requests within three days is typical or reflective of current industry capabilities, or that marketers possess such software.

To the contrary, since the 2003 enactment of the CAN-SPAM Act, marketers have endeavored to implement systems, policies and procedures designed to ensure compliance within the current ten day time period for honoring opt out requests. Reducing this time period to three days would be unduly burdensome to businesses – particularly small businesses with more limited financial resources – who have already invested significant time, money and other resources into ensuring compliance with the current ten day requirement. This is particularly true in light of the fact that there is no evidence to suggest that there have been compliance issues, or instances of consumer harm, as a result of the current ten day standard.

MPA members may receive opt out requests at any number of different consumer contact points: (i) calls and/or emails from the consumer directly to the publisher requesting opt out; (ii) opt out requests received by one of the third party providers used by the publisher to handle e-mail solicitations on its behalf; and (iii) opt out requests received by the outside fulfillment centers used to fulfill subscription services for the publisher. Opt out requests could also potentially be received by a list rental company providing e-mail distribution lists to the publisher.

Allowing opt out requests to be made through any of these contact points is a significant benefit to the consumer. Nevertheless, it greatly adds to the time required to process and honor such requests, as the requests must be registered in multiple databases. This requires a transfer of data between the parties (which, for security reasons, may be done on a weekly basis), as well as the integration of the requests into each database. As the publisher, fulfillment center and e-mail providers often have different software platforms, this process can often take several days.

By way of example, a magazine seller might use multiple e-mail service providers to handle e-mail campaigns for different titles. To ensure that each of these service providers receives all relevant opt-out information, the seller may maintain all opt out requests in a centralized database. New opt out requests received at all contact points would then be submitted to the magazine seller, converted into a single software format and added to this central opt out database. The seller would then update its opt out files and send them electronically to all service providers and vendors. These entities would then scrub their distribution lists against these opt out files. This process can take several days depending upon the exact timing of the opt out request and the file creation. In addition, many smaller entities input opt out requests manually, often have only a single employee designated to oversee the suppression function, and typically require more time to fully implement opt out requests. In short, it can frequently take upwards of ten days to fully integrate an opt out request into all relevant databases.

Moreover, the process of disseminating a commercial e-mail message campaign itself often involves multiple parties and requires several days. First, the distribution list may be obtained from a list rental company. The list is then scrubbed against opt out suppression files, uploaded to e-mail distribution software or sent to an e-mail vendor for uploading, and re-checked against the suppression file. A test message is then typically sent and reviewed prior to the transmission of the final message. The process of obtaining the initial distribution list, scrubbing against the existing opt out suppression file, testing the message and then disseminating the final commercial message can often take several days. In contrast, opt out requests can arrive daily – including during the interval between the scrubbing against the suppression file and the dissemination of the message. Reducing the time period for honoring

opt out requests to three days would greatly undermine the viability of e-mail campaigns, as the purging done in connection with a particular e-mail distribution list could be out of date (i.e., more than three days old) prior to the actual dissemination of the final e-mail message.

In this regard, it is important to note that unlike the name removal provision of the Deceptive Mail Prevention and Enforcement Act, which sets forth a time period by which names must be removed from the list used for selection of mail recipients, the opt-out requirements of CAN-SPAM apply to the actual dissemination of the e-mail message itself. Thus, even if the opt-out requests could be transmitted daily, given the steps and process necessary to generate a list for e-mail transmission, it would be virtually impossible to actually prevent dissemination of the e-mail message to a person who has submitted an opt-out request within such a short time frame. MPA remains extremely concerned therefore that shortening the time frame from ten days to three days may actually result in a higher incidence of inadvertent error which will undermine consumer confidence in the process.

MPA believes that requiring companies to attempt to modify their current systems in an effort to comply with a shorter time period would impose a significant and unnecessary financial burden as companies would be required to more than double the frequency of their list scrubbing efforts – often for only a handful of additional opt out requests. Of course the financial impact and burden on smaller businesses will be even greater. Moreover, as noted above, the Commission has not cited any evidence in its NPRM indicating the consumers have been harmed as a result of the current ten day standard or that this standard has led to other compliance issues. While some commentators have apparently expressed concerns about the possibility of marketers “mail bombing” consumers during the ten day period, there is no evidence to suggest that legitimate marketers have engaged in such activity during the eighteen plus months in which the

Act has been in effect.¹ In contrast, “spammers” that bombard consumers with frequent, unwanted e-mail messages, and which are much more likely to engage in such mail bombing activity, are no more likely to comply with a three day opt out period than a ten day period. Thus, the reduction of the opt out period from ten to three days will unduly burden legitimate marketers with no real benefit to consumers.

Finally, MPA respectfully disagrees with the Commission’s assertion that the reduction of the time period within which to honor opt out requests will serve to “better protect the privacy interests of e-mail recipients.” NPRM, 70 F.R. at 25443. To the contrary, we believe that this approach will lead to a reduction in privacy protection, as there is greater potential for error as parties rush to transfer data in order to comply with a three day compliance window that their systems and procedures were not designed to accommodate.

III. Marketers Should Have The Ability to Impose Reasonable Requirements Designed to Verify the Identity of Individuals Who Wish to Opt Out

The Commission proposes to broadly prohibit the imposition of any fee or any requirement that the recipient provide any personally identifiable information, beyond the e-mail address in question, in order to effectuate an opt-out request. MPA understands the Commission’s concern and echoes its desire to ensure that unscrupulous marketers do not improperly impede and undermine the recipient’s opt out rights. For this reason, we fully support the proposal to prohibit the imposition of any fee as a prerequisite for having an opt-out request accepted or honored.

¹ We also note that to the extent that a marketer was inclined to engage in such “mail bombing” activity, it would still have the ability to do so during the shorter three day period. Having said that, there is little incentive for legitimate marketers to engage in such activity, as the consumer at issue has just indicated that he or she is uninterested in receiving e-mail messages from the marketer (making it unlikely that the consumer would make a purchase or respond favorably to an e-mail received shortly after such opt out request).

However, we do not believe that it is appropriate to limit the information required at the time of the opt-out request to merely the e-mail address in question. In light of recent concerns with identity theft and breaches of online security, it behooves marketers to ensure that the opt-out request is in fact coming from the person to whom the particular e-mail address is assigned. For example, if the recipient had previously registered with the web site and has a login, user name and/or password, the marketer should be free to request such information as part of the opt out request process in order to verify the identity of the person submitting the opt-out request.

Similarly, rather than restricting the steps for submitting an opt-out request to the sending of a single reply e-mail or visiting a single Internet web site, marketers should have the right to be able to send a single confirming e-mail to the recipient at the e-mail address in question prior to honoring the opt-out request. Such e-mail would acknowledge receipt of the opt out request and ask the recipient to send a follow up e-mail message confirming his or her identity and that the original opt out request had been sent. Again, the purpose of this two step approach would be to verify the validity of the original opt-out request.

IV. Forward to a Friend E-mail Messages Fall Outside the Scope of the CAN-SPAM Act

MPA respectfully takes issue with the Commission's assertion that where a person forwards or uses a web based mechanism to transmit a commercial e-mail message to another, the initiation of such forwarded message has been "procured" within the meaning of the CAN-SPAM Act if the person receives some inducement (such as additional entries in a sweepstakes) to do so. In MPA's view, Forward to a Friend programs fall within the definition of a "routine conveyance," and thus outside the scope of the CAN-SPAM Act, regardless of whether the consumer is provided with an incentive to forward the e-mail message to a friend.

As indicated in the Commission's NPRM, the analytical starting point for determining the applicability of the CAN-SPAM Act to Forward to a Friend campaigns is the definition section of the statute. The majority of the requirements of CAN-SPAM, including those most problematic in the Forward to a Friend scenario, apply to the "sender" of the commercial e-mail message. The sender is defined as one who "initiates" the message and whose product, service or Internet web site is advertised or promoted by the message. 15 U.S.C. § 7702(16)(A).² The term "initiate" is defined in turn to mean to originate or transmit such message, or to procure its origination or transmission, but expressly excludes actions that constitute a routine conveyance of such message. Id. § 7702(9).

Thus, even if the forwarding of a commercial e-mail message is "procured" by the sender of such message (i.e., by inducing the recipient to forward the message through the use of an incentive or premium), the definition of "initiate" will not be triggered so long as such message was forwarded through actions constituting a "routine conveyance" thereof. A routine conveyance is defined as "the transmission, routing, relaying, handling or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses." Id. § 7702(15).

As noted by the Commission, any time a company makes available a mechanism for consumers to forward a commercial e-mail message it obviously hopes that the message will be sent to other consumers interested in its advertising message. To further that end, e-mail recipients are typically provided with some incentive to make use of the "Forward to a Friend" feature. In that sense, the company seeks to procure the transmission of the forwarded message. Nevertheless, the typical Forward to a Friend campaign involves the routine conveyance of such

² Note, the recipient who "forwards" the Forward to a Friend e-mail message is not the initiator of such message, as

message – the message is transmitted via an automatic technical process for which another person (i.e., the recipient of the original message) has provided the list of recipient addresses. As such, MPA believes that Forward to a Friend e-mails fall outside the scope of the CAN SPAM Act; regardless of the use or appearance of any inducement to the recipient of the original commercial e-mail message.

Moreover, as noted previously, classifying the underlying advertiser as the sender of the Forward to a Friend e-mail would be burdensome and create significant compliance problems. If the forwarded e-mail were itself deemed to be a commercial e-mail of the underlying sender, that entity would presumably have to include its physical postal address and an opt-out feature in the forwarded e-mail. While opt out requests would have to be honored by the underlying sender, the possibility exists that the request would be sent to the forwarding consumer rather than the underlying sender itself. As this sender has no ability to control the forwarding consumer, it has not ability to compel that consumer to notify it of any such opt-out requests (and thus no way to ensure that these requests will be honored). Also, a consumer might forward an e-mail from a marketer to a friend who has previously opted out of receiving e-mails from that marketer. If the forwarded e-mail were deemed to have been sent by the marketer, it would technically be in violation of the Act as a result of the forwarding of the e-mail – a communication over which the marketer exercised no control.

In light of these issues, MPA does not believe that it is either proper or feasible to characterize a Forward to a Friend e-mail message as having been sent by the sender of the underlying commercial e-mail message.

message does not contain an advertisement for the recipient's products, services or web site.

V. Messages Sent By Employers to Employees at Employer-Provided E-Mail Addresses Should be Deemed Transactional or Relationship in Nature

Finally, MPA believes that e-mails sent by employers to employees at employer-provided e-mail addresses should be deemed to be messages “directly related to an employment relationship” and thus a relationship or transactional message pursuant to Section 7702(17)(A)(iv). Employer/employee communications clearly fall outside the scope and purpose of the CAN-SPAM Act and employees should not have the ability to opt out of e-mail messages sent by employers through e-mail accounts controlled (and, in fact, owned) by the employer itself. Indeed, as the e-mail account at issue belongs to the employer, not the employee, the position can be taken that the employer, not the employee, is the “recipient” of the message and, thus, that the employee has no opt out right with respect thereto. Moreover, there is no evidence to suggest that there has been a problem with respect to the dissemination of commercial e-mail messages from employers to employees at work e-mail accounts, nor are employers set up to honor opt out requests received from in-house e-mail addresses.

As such, we believe that the Commission should clarify that e-mails sent from employers to employees at employer-provided e-mail addresses are transactional or relationship in nature.

Conclusion

We thank the Commission for providing us with the opportunity to submit the preceding comments on behalf of our membership. Our organization is committed to working with the Commission to ensure that its regulations under the Act represent an appropriate balancing of the needs and requirements of the senders and recipients of e-mail communications. If you have any

questions or concerns regarding these comments or any other aspects of the MPA, please feel free to contact us.

Respectfully submitted,

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